

Washington Tariff & Trade Letter[®]

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Export Controls and Trade Laws

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Vol. 26, No. 12

March 20, 2006

FCPA ENFORCERS LOOKING AT FREIGHT FORWARDERS, PORT AGENTS

Justice and the Securities and Exchange Commission (SEC) are looking at illegal payments made by “business partners” of U.S. companies operating overseas, including distributors, freight forwards and customs clearance providers, in their enforcement of the Foreign Corrupt Practices Act (FCPA), according to trade attorneys. These partners are now considered “fair game,” said one attorney speaking at an American Conference Institute program March 14.

The activities of such companies on behalf of U.S. partners in Africa and Asia are of particular interest to FCPA enforcement officers. The issue appears to go beyond “facilitation” or grease payments that are often made to low-level officials at ports and can be legal under FCPA rules under certain conditions.

The expansion of U.S. enforcement of the anti-bribery law comes as other nations are stepping up enforcement of similar laws in their countries, according to Margaret Ayres, an attorney with Davis, Polk and Wardwell in Washington. Speaking to an audio-conference co-sponsored by WTTL March 16, Ayres noted several countries that have ongoing investigations of U.S. firms. In an increasing number of cases, firms are disclosing these investigations in reports to the SEC to comply with new disclosure rules imposed by the Sarbanes-Oxley Act, she said.

BIS WILL LIMIT SCOPE OF CONVENTIONAL ARMS CATCH-ALL RULE

Having already promised to limit its coming conventional arms “catch-all” rule to items subject to antiterrorism (AT) controls, the Bureau of Industry and Security (BIS) intends to limit the new licensing requirements even further to about 35 specific Export Control Classification Numbers (ECCNs), agency staffers report. Most of the ECCNs that will be subject to the new controls fall under the 900 series in each of the Commerce Control List (CCL) categories.

BIS officials say the concept of a catch-all regulation, which would require exporters to seek licenses for exports that could be for military end-use by customers in embargoed countries, has received interagency approval. BIS now has a draft of the rules and plans to circulate it to its technical advisory committees for comments some time in April.

After those technical comments are received, the text will be sent out again for interagency review. The separation of the rule into two parts, one for China and one for all other arms-embargoed countries, remains likely (see **WTTL**, March 13, page 4). In selecting the ECCNs to be covered by the new rules, BIS is considering U.S. production and export value of the items

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Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.
Circulation Manager: Elayne F. Gilston

and the indigenous production of the products in countries subject to arms embargoes, particularly in China. It did not use the Militarily Critical Technologies List to identify the products to be subject to controls, BIS Licensing Officer George Loh told the BIS Materials Processing Technical Advisory Committee March 15.

Examples of material processing equipment that may become subject to the controls are ECCNs 1B999(e), 2A991 and 2B991, he noted. While exporters won't be required to obtain signed end-use statements from customers to prove that their goods are not intended for military use, Loh suggested getting such a written statement might be advisable.

Although the catch-all rule is suppose to implement a Wassenaar Arrangement Statement of Understanding, most of the identified ECCNs that BIS will target in the new rules have been removed from Wassenaar controls and are maintained by the U.S. unilaterally, industry consultant Bill Root told the TAC. Wassenaar dropped the controls in many cases because it found the items could not be controlled because of their widespread availability, noted Root, a former State Department official who represented the U.S. at Wassenaar's predecessor organization, the Coordinating Committee on Multilateral Export Controls (COCOM).

The expected regulations will include a definition of "military end use," BISers say. That definition will cover any item that is incorporated into a military product or intended for the production, maintenance, operation, or installation of an item controlled on the U.S. Munitions List or the international Munitions List, as well as related technology. The list of countries that will be subject to the catch-all controls will be those identified in Section 126 of the International Traffic in Arms Regulations (ITAR). In addition to China and known terrorist-supporting countries, the list includes such countries as Vietnam, Belarus, Haiti, and others where international restrictions were imposed to dampen armed conflicts.

DOHA TALKS WON'T MEET ALL APRIL DEADLINES, PORTMAN CONCEDES

U.S. Trade Representative (USTR) Rob Portman now concedes that Doha Round negotiators won't be able to fill-in the all the key blanks on agriculture and non-agriculture market access (NAMA) by the April 30 deadline ministers set at their December Ministerial in Hong Kong. A meeting of ministers from major trading countries in London March 10-11 failed to produce the progress Portman had hoped for, he told reporters March 15. In London, countries known as the G-6 were supposed to move forward "in concert" with new offers to move the Doha talks forward, but instead they appeared to agree to stand still in concert.

"I think for me April 30 ought to be about making the bigger decisions on NAMA and agriculture which is our goal. It's not to work on the whole broad range of WTO issues," he said. "To me that would be more likely than coming up with some of the smaller elements," Portman added (see **WTTL**, March 6, page 4).

"My own view is that it might almost be easier to make the big decisions then to make on an incremental basis some of these smaller but actually politically difficult decisions," Portman said. His "big picture topics" would include the formulas for reducing tariffs and the broad tiers into which tariffs would be placed to determine the amount of reduction that would be required. Also in this category would be the number of "sensitive" products that would be exempt from the tariff cutting formula.

BROKERING REQUIREMENTS SLOWING LICENSING AT STATE

The State Department's intensified application of its brokering regulations may be creating licensing delays for some exports because they require a dual licensure process, according to Robert Clifton Burns, a partner with the law firm of Powell Goldstein in Washington. State's Directorate of Defense Trade Controls (DDTC) is extending the brokering rules beyond U.S.

persons and companies to foreign person “otherwise subject to the jurisdiction” of the United States. In some cases, when intermediary foreign consignees are identified on an export license, they are now being required to register as defense brokers and obtain a license along with the U.S. exporter, Burns told an American Conference Institute program of defense industry compliance March 14 (see **WTTL**, April 4, 2005, page 1).

“There are now export licenses being returned when [DDTC sees] an intermediary consignee who is not a registered broker,” Burns said. “If you have a brokerage transaction, not only does your brokerage have to register, certain brokerage transactions have to be licensed,” he said.

The problem for exporters is that there are two separate groups in DDTC handling these licenses. “They are just now starting to do brokerage licenses and it’s taking them forever,” he said. Burns noted a case he was involved with last year for a small arms sale to the Iraqi Defense Force from Eastern Europe. Although the case was in the “expedited channel” at DDTC, it took almost 40 days instead of the normal five days for other licenses.

DDTC is considering guidelines that would apply the brokering definition to anyone “who touches a defense item overseas,” Burns said. “If he has anything to do with a U.S. origin defense article overseas, that person is otherwise subject to U.S. jurisdiction and must register,” he added. “Even if he may never have set foot in the United States; he may never have had any other contact; you may only deal with him in a foreign country; you may only visit him or deal with him by e-mail; he’s going to be otherwise subject to U.S. jurisdiction,” Burns said.

DDTC’s application of its regulation to foreign persons creates other problems as well. While the International Traffic in Arms Regulations (ITAR) requires a broker to be someone “qualified to do business in the United States,” some foreign brokers or consignees don’t meet that requirement and may want to avoid being considered qualified to do business in the U.S. for tax or other business reasons. In some cases, DDTC has waived this requirement, Burns reported. Another problem arises because export licenses must be signed by a U.S. citizen. A foreign broker may not have a U.S. citizen to sign the license. DDTC is telling U.S. defense exporters to sign the license for their brokers, but U.S. firms are reluctant to accept the responsibility for firms over whose compliance and operations they have no control.

LARGE FIRMS CONTINUE TO DOMINATE EXPORTS

The latest Census Bureau profile of U.S. exporters shows again that large manufactures dominate the exporting trade, with just 100 large companies accounting for 36% of the value and 53% of all shipments of manufactured exports in 2004, the latest year reported. Overall, of the 231,736 “identified U.S. exporters” in 2004, 6,597 large manufacturers accounted for 71% of all exports by value, Census reported. Just 500 companies accounted for 62% of all exports by value. A large exporter is defined as a company with 500 or more employees.

The number of identified firms exporting to China continues to grow faster than any other international destination. In 2004, Census identified 21,360 U.S. firms exporting China, a 12% increase from 2003 and 30% more than the 16,448 exporting to China in 2003. Canada remains the destination for the largest number of U.S. exporters, with Mexico moving up to second place ahead of the United Kingdom, and Germany moving up ahead of Japan to fourth place.

MISCELLANEOUS TARIFF BILL FACES WAIT IN SENATE

It may be a case of hurry-up-and-wait for the annual miscellaneous tariff bill (H.R. 4944) the House passed March 15 by an overwhelming 412 to 2 vote. Senate Finance Committee Chairman Charles Grassley (R-Iowa) reportedly remains reluctant to take up the legislation in

the Senate unless he can get agreement that the bill will be handled according to the “regular order” under which miscellaneous tariffs were enacted in the past, Senate sources say. Regular order would mean no controversial amendments would be attached and all provisions would be fully vetted by members and the International Trade Commission (see **WTTL**, Feb. 20, page 2).

Traditionally, miscellaneous tariff bills have been enacted by Congress every two years or so and provide for the suspension of certain specific duties. They have been considered non-controversial because the imports usually don’t effect any U.S. competition. Any objection to a specific provision would normally cause it to be dropped from the legislation.

In recent years, because few amendable trade bills are sent from the House to the Senate, some lawmakers have tried to use the measure to make more controversial trade law changes. Because of the difficulty faced getting miscellaneous tariff measures through the Senate in the last four years, Grassley doesn’t want to spend the time and effort on another bill. The House passed bill includes more than 375 tariffs suspensions and over a dozen provisions requiring the liquidation or reliquidation of previously imported goods. It also would extend the Africa Growth and Opportunity Act (AGOA) beyond its current 2008 expiration date to 2015.

HOUSE PANEL APPROVES EXPANSION OF IRAN SANCTIONS LAW

U.S. companies would no longer be able to insulate themselves from legal liability for the investments their foreign subsidiaries make in Iran under legislation (H.R. 282) the House International Relations Committee (HIRC) approved March 15 on a 37-3 vote. With more than 350 co-sponsors in the House, the legislation, which amends the Iran and Libya Sanctions Act (ILSA), appears likely to get House approval whenever it comes up for a vote.

HIRC Chairman Henry Hyde (R-Ill.) said he was supporting the amended bill adopted by the committee reluctantly because it “would have less impact on the Iranian government than on the allies whose support we seek.” He also noted White House opposition to the measure. With oil selling at \$60 a barrel, the sanctions aren’t likely to affect the resources available to Iran, he said.

Hyde said he supported the substitute measure because it includes a new provision that would allow the president to waive sanctions against a firm invested in the Iran petroleum industry. “He will be able to exercise that waiver if, for example, the government of the enterprise in question cooperates in our effort to coerce Iran to give up its nuclear arsenal,” he explained.

*** * * BRIEFS * * ***

IEEPA: USA PATRIOT Act signed by President Bush March 9 includes provision in Title IV, Section 401 increasing penalties for violations of International Economic Emergency Powers Act to \$50,000 per violation from \$10,000 and up to 20 years in prison from 10 years. Change applies to BIS and OFAC cases.

SOFTWOOD LUMBER: NAFTA panel March 17 upheld ITA’s Nov. 22 *de minimis* remand recalculation of CVD rate on imports from Canada (see **WTTL**, Nov. 28, page 1). It refused to rule on British Columbia request to have ITA ordered to revoke CVD order *ab initio*. “The panel is constrained to assume the department will correctly follow the law,” panel stated.

CIT: Senate March 13 voted 82 to 0 to confirm Leo Gordon to be judge on Court of International Trade.

MEDICAL DEVICES: Ways and Means Chairman Bill Thomas (R-Calif.) has asked ITC to conduct Section 332 fact-finding investigation into competition facing U.S. medical device makers in foreign markets.

AMMONIUM NITRATE: In March 14 “sunset” determination, ITC voted 6-0 that lifting antidumping order on ammonium nitrate from Russia would lead to renewed injury to U.S. industry.

ANTIBOYCOTT: BIS has asked RAPTAC to review draft antiboycott enforcement mitigation guidelines.